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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1957.

No. 21.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT  
AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA  
(UAW-CIO), An Unincorporated Labor Organization, and  
MICHAEL VOLK, An Individual,  
Petitioners,

vs.

PAUL S. RUSSELL,  
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

**BRIEF FOR RESPONDENT.**

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**BRIEF FOR RESPONDENT.**

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**I. QUESTION PRESENTED.**

The only federal question involved may be appropriately stated as "whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues

where such conduct constitutes an unfair labor practice under that Act<sup>1</sup> and where the plaintiff in the action is an *employee* and the defendants are a labor organization and its agent, and where the damages claimed and recovered consisted of *loss of wages*, mental anguish and punitive damages, and where the wrongful conduct alleged in the complaint constituted an unfair labor practice under section 8 (b) (1) (A) of the Act and consisted of preventing the plaintiff from entering his place of employment by mass picketing, intimidation, taking hold of his car, and threat of personal injury and property damage.

Stated a little differently, the question is whether Congress, by the enactment of the Taft-Hartley Act, intended to take away from the American working man his common-law right to maintain a common-law tort action in an appropriate state or federal court, and his incidental right to a jury trial, in a case where a labor organization and its agent and their confederates, by mass picketing, threats, and force and violence, prevented his entering his place of employment and caused him to lose wages and to suffer mental pain and anguish.

## II. STATEMENT OF THE CASE.

### Force and Violence Alleged.

The essence of the claim asserted in both counts of the complaint was that the defendants willfully and maliciously prevented the plaintiff from going to and from the plant where he was employed and from engaging in his employment. According to the complaint, the defend-

<sup>1</sup> The quoted portion of the statement of the question is from *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, at 657; the italicized portion of the addition to the quotation are the facts of this case which petitioners claim render the *Laburnum* case inapposite, that is, that the plaintiff here is an *employee* and that an element of damage claimed is *loss of wages*.

ants accomplished that objective by establishing a picket line along and in the public street which was the only means of access to the plant. It was alleged that the picket line consisted of great numbers of persons, some of whom were standing along the street and some of whom were walking in a close and compact circle across the entire traveled portion of the street. The particular averment as to means employed to prevent plaintiff from entering the plant was that "said pickets by force of numbers, threats of bodily harm to plaintiff and damage to his property, and by force and violence consisting of taking hold of the automobile in which plaintiff was riding and thereby stopping it, and consisting of some of said pickets standing or walking in front of said automobile, blocked said public street and made passage to said plant over the same impossible for plaintiff and for others similarly situated, and defendants thereby wilfully and maliciously prevented plaintiff from going to and from said plant and from engaging in his said employment." It was further averred that this unlawful activity caused the plaintiff to lose earnings from his employment and to suffer mental anguish, both of which elements of compensatory damages were claimed, in addition to such punitive and exemplary damages as might seem appropriate to the jury to punish the defendants for their wrongful conduct, and to deter them and others from committing similar wrongs in the future. (R. 4-7, 10.)

### **Force and Violence and Loss of Wages Found by Jury.**

By their plea of the general issue (R. 11) the defendants cast on the plaintiff the burden of substantially proving the above allegations. The trial judge repeatedly instructed the jury that plaintiff could not recover unless the jury was reasonably satisfied from the evidence that the acts complained of had occurred and that the plaintiff suffered a loss of wages as the natural and proximate re-

sult thereof.<sup>2</sup> The jury resolved the issues against the defendants. Thus do they stand convicted of mass picketing, accompanied by threats of bodily harm to plaintiff and damage to his property, and of having physically blocked his way by taking hold of his automobile and stopping it, and by pickets standing and walking in front of his automobile. The verdict of the jury also established that the natural and proximate consequence of that conduct was the loss of wages which the plaintiff would have earned had he been permitted to enter the plant.

### **Petitioners' Criticism of Findings Below.**

Petitioners, not content to argue the case on the basis of the facts found by the jury, insinuate prejudice on the part of the jury (Petitioners' Brief, pp. 21, 62) and criticize the Supreme Court of Alabama because they say it failed to make a finding that work was available to the plaintiff at the time he was denied access to the plant by the unlawful picketing (Petitioners' Brief, p. 61, and footnote 23).

### **The Deliberation of the Jury and the Approval of Its Verdict by the Trial Judge.**

While it is unusual for a record to shed much light on whether a jury is prejudiced, other than the inferences which may be drawn from the verdict and the evidence on which it rests, the record here does show that the members of the jury were not unanimous at the inception of their deliberations and that they were making a commendable effort to arrive at a decision, and after some de-

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<sup>2</sup> E. g., defendants' given charges 5, 6, 10 and 11 (R. 639-641), one of which was:

"6. I charge you that unless you are reasonably satisfied from the evidence that the acts complained of by plaintiff occurred, and that the plaintiff suffered a loss of wages as the natural and proximate result of said acts, you should return your verdict for the defendants."

liberation reported to the court for further instructions, and that the trial judge very fairly answered their questions and encouraged them to reach a verdict, but did not put any pressure on them and, indeed, emphasized that no member of the jury should give up a conscientious view entertained by him after thorough consideration (R. 642-643).

The trial judge approved the verdict by the denial of defendants' motion for a new trial asserting that the verdict was contrary to the evidence and indicated bias and prejudice (R. 13), which motion was denied by the trial judge after he had the benefit of oral arguments and written briefs and, as he expressed it, had given the motion "full and mature consideration" (R. 16). This was the same trial judge who initially sustained the petitioners' plea to the jurisdiction of the court, a ruling fatal to the maintenance of this action until it was reversed,<sup>3</sup> and who set aside a verdict against the petitioners and in favor of Burl McLemore, the plaintiff in the companion case referred to in footnote 3 on page 5 of Petitioners' Brief, when he concluded that argument of counsel to the jury in that case was improper, which ruling, incidentally, was affirmed by the Supreme Court of Alabama; notwithstanding the earnest insistence of McLemore to the contrary.<sup>4</sup>

### **Opinion of the Supreme Court of Alabama.**

Criticism of the Supreme Court of Alabama because it failed to make a finding of the availability of work, is hardly appropriate when it is considered that appellate

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<sup>3</sup> *Russell v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America*, 258 Ala. 615, 64 So. 2d 384.

<sup>4</sup> *McLemore v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America*, 264 Ala. 538, 88 So. 2d 170.

courts generally do not detail the evidence and make specific findings in declining to disturb the verdict of a jury which the trial judge has refused to set aside. Especially is such criticism unwarranted when it appears from the opinion of the Supreme Court of Alabama that this contention there made by the petitioners was clearly understood and accurately stated by the court, and was responded to with the statement that the record was voluminous and the evidence in conflict, and that there was evidence introduced by the plaintiff which, if believed by the jury, justified the verdict for the plaintiff, with a citation of the authorities showing that such ruling was in line with well-established principles. Furthermore, it appears that after so responding to the contention of the petitioners, the Supreme Court of Alabama in discussing the petitioners' request for a directed verdict, detailed several items of the evidence giving rise to a natural and reasonable inference of availability of work (R. 645-646; 264 Ala. 456, at 468-469, 88 So. 2d 175, at 184-185).

### **The Evidence and Inferences From It.**

Since the petitioners have had "one trial and one appeal already" and since the verdict of the jury responding to the issues made by the complaint, the plea, and the instructions of the court, adjudicated the facts of the case, it would seem to be unnecessary to enter upon a lengthy discussion of the evidence. However, since petitioners have made the criticism of the findings below to which we have just alluded, and since they set forth in their brief several items of evidence favorable to them, some of which reflect a strained construction of the record, we deem it appropriate to mention some of the evidence showing the nature of the case, and that there was ample foundation for the verdict of the jury, and to comment on some of the conclusions which defendants draw from the record.

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### **Responsibility of the Union.**

The discussion of the evidence should be prefaced with the statement that the union did not disclaim responsibility for the occurrences on the picket line. At the inception of the picketing, T. J. Starling, M. E. Duncan and the defendant Michael Volk, respectively the Regional Director, Assistant Regional Director, and International Representative of the union, were all at the picket line participating in and supervising the picketing (R. 402, 407, 180-181). At two meetings of the members of the union on the day preceding the strike, Starling urged all members of the union to be at the picket line the next morning, and Duncan and Volk participated in making plans to that end (R. 401, 320-323). Herman L. Dobbs, who was a member of the union and who attended the second union meeting the day before the strike, testified that Volk and the others who addressed the meeting instructed the pickets to let salaried employees through the picket line, but not to allow hourly-paid employees to enter the plant (R. 243). In its answer to interrogatory 15 the union conceded that one of its representatives, usually one of the three named, was present at the picket line at practically all times (R. 122-123). The union also admitted that it furnished food and lunches to the pickets on duty during the strike (R. 123), and that during the picketing it made arrangements for such bail bonds as might be requested by Duncan or Volk for such of its members as might be arrested (R. 124).

### **The Testimony of the Plaintiff.**

The plaintiff testified that he was employed at the copper plant as an hourly-paid electrician and did general maintenance work on electrical equipment, such as motor controls, instruments that controlled the furnace operations, the public address system, and the electric clock system, and that when he was not busy with special jobs

or with special assignments he worked on general overall maintenance (R. 18, 45).

On the morning of July 18, 1951, the plaintiff had no knowledge or information that there was to be a strike at the plant and attempted to report for work as usual, having his lunch with him, and approached the plant in his car on Railroad Avenue, which was the only entrance to the plant and was a paved street from 20 to 24 feet wide (R. 20).

A picket line was located at approximately the point where Railroad Avenue entered the plant property, at which there were twenty-five to thirty pickets carrying signs and walking about three feet apart in a circle extending completely across the street (R. 26). Adjacent to the picket line, immediately off the south side of the street, was a group which plaintiff estimated at from one hundred to one hundred fifty persons (R. 29), and those in this group were constantly changing places with those walking in the circle (R. 30). There was another group of about fifty persons adjacent to the picket line immediately off the north side of the street (R. 30).

As plaintiff approached the picket line there were groups of people in the street, and he proceeded in his car slowly toward the plant, and when he got within twenty or thirty feet of the picket line he felt a drag on his car and stopped (R. 27). While plaintiff was stopped there, Starling, the Regional Director of the union, came to the side of plaintiff's car and the following conversation was had:

Starling: "Hourly or salaried?"

Russell: "What difference does it make?"

Starling: "I am the Regional Director in charge. If you are salaried, you can go on in. If you are hourly, this is as far as you can go" (R. 25-27).

At this time Howard Hovis, a union member and picket captain and originally a defendant who was stricken by

amendment, and who, according to the testimony of another witness, grabbed hold of plaintiff's car just before it stopped and was dragged for several feet (R. 96), walked to the car and he and Starling and plaintiff engaged in some further conversation, substantially to the effect that Starling told the plaintiff that he was blocking traffic and asked him to turn around and get out, and plaintiff told Starling and Hovis that he wasn't blocking traffic and that he wanted to go straight ahead (R. 27). The plaintiff testified that every time someone moved from in front of him he edged forward toward the entrance to the plant (R. 28), and that at one time an empty bus came up from behind going into the plant to pick up employees coming off third shift, and that at this time Starling came back over to his car and again told him that he was blocking traffic and would have to move, and he again told Starling that if they would open up in front, traffic wouldn't be blocked; Starling then motioned to the picket line to open up on the left side and they did so and the bus passed around the plaintiff and went through the picket line; and as it did so the plaintiff attempted to follow it through, and as soon as he moved forward someone in the group to the right of the picket line yelled, "He's going to try to go through," and another yelled, "Looks like we are going to have to turn him over to get rid of him," and several took up the cry, "Turn him over," and the picket line crowded between him and the bus and blocked his passage (R. 31-32). The plaintiff remained at the picket line for an hour and one-half or two hours, and from time to time tried easing into it, and each time he did so the pickets would stop walking and turn their signs down toward his car, and some of them would touch his car with their signs (R. 32). Plaintiff testified that he became satisfied that he could not get through the picket line without running over somebody or else getting turned over, and that he then backed out and went home (R. 33).

During the hour and a half or two hours plaintiff was in the vicinity of the picket line he observed a number of other maintenance and production employees come up by him and turn back, and he estimated that he saw something in the nature of two hundred employees there with their lunches prepared to go to work who were turned back (R. 33).

### **Testimony of Burl McLemore.**

Burl McLemore, who was a press operator who worked on the first shift from eight in the morning until four in the afternoon, testified that on the first day of the strike he left his home as usual with his lunch and his eighteen year old son, who was going with him to return his car to his home after he got out at the plant, and that he had no information that there was to be a strike (R. 92-93). As McLemore approached the picket line he said that the pickets threw up their hands and were hollering, "There's one that's not going through the line this morning," and that Hovis grabbed at the handle on the door of his car, but it was locked and flipped over and Hovis did not hold it (R. 94). One of the pickets by the name of Runager, who was a member of the union bargaining committee, told McLemore that they were not going to let anybody in the plant and did not want to have any trouble, and McLemore told him if the pickets would turn his car loose, he would back up (R. 94-95). McLemore backed his car up and then pulled off the pavement to the left and tried to drive around the picket line, but the pickets moved over in front of him and again grabbed his car and shouted, "Turn him over" (R. 95). Runager again told McLemore that he could not go to work and McLemore got out of his car and told his son to take the car home, and he then tried to walk through the picket line and Runager grabbed him by the arm and again told him that they didn't want to have any trouble with him, and McLemore made no further effort to get by the picket line

(R. 95). McLemore also testified as to plaintiff's approach and about Hovis grabbing plaintiff's car and the shouts of "Turn him over", and that four or five of the pickets caught hold of plaintiff's car (R. 96-97).

### **William D. Schelbe Testimony.**

Schelbe was purchasing agent at the copper plant and on the morning the strike began had no information that there was to be a strike (R. 157), and was accompanied to the plant in his automobile by his wife and four year old son (R. 156). Before he got to the plant, Schelbe was stopped by Ralph Webster and a group of six persons with him (R. 157), at the same point where Webster stopped the plaintiff and tried to stop McLemore (R. 23, 93). This group asked to see Schelbe's identification card which identified him as a management employee of the company, and Schelbe objected to showing it and protested that they had no right to demand it (R. 157-158). When Schelbe refused to show his card, one member of the group came up to his car and put his hands on the car and said, "Schelbe, we'd certainly hate to have your car be the first one we turned over" (R. 158-159). Mrs. Schelbe became extremely nervous and upset and Schelbe then showed his identification card to the group and was allowed to proceed into the plant (R. 159-160).

### **Testimony of Jerry Comer.**

Comer was a training supervisor and had no information that there was to be a strike at the plant on July 18, 1951, and as he approached the picket line he saw Paul Russell's car ahead of him on the right-hand side of the street with thirty or forty persons around it, and in addition to that, the picket line was walking in a circle across the street (R. 180-182). Michael Volk flagged Comer down and stopped him and asked him if he were salaried or hourly, and when Comer told him he was salaried, Volk said, "O. K." and motioned and yelled to the picket

line that it was "O. K." for Comer to pass through, and thereupon Comer pulled around to the left-hand side of the street and passed the plaintiff's car and went through the picket line (R. 180-181).

### **Testimony of Other Hourly-Paid Employees.**

Twenty first shift hourly-paid employees, besides the plaintiff and McLemore, testified substantially that they reported for work on the morning of July 18, 1951, had their lunches with them and generally came in a car with from one to three other hourly paid employees, and most of them had no knowledge that there was to be a strike at the plant that day. These witnesses substantiated the fact of Russell's car being blocked by the picket line and that there were outcries of "Turn him over" (R. 186-238).

### **Plant Shut Down:**

It was undisputed that no hourly-paid employee entered the plant on July 18, 1951 (R. 280). B. M. Cornell, general foreman of the converting department, testified that at the time the first shift was due to have come into the plant on the morning of July 18, the machinery, draw benches and furnaces were in their usual and customary condition, similar to what would have been the case if the first shift was coming in to work, and that the heating furnace was almost full of copper billets, whereas, the proper procedure, if the plant were going to close down, would have been to empty the furnace, which would have required an experienced crew three and one-half hours (R. 250-251). Supervisors emptied the heating furnace by operating the extrusion press and making copper tubing out of the billets by the regular process, and the plant did not again produce tubing until August 22, 1951 (R. 250).

### **Petitioners' Argument Work Not Available.**

Petitioners argue that the plaintiff was not entitled to recover because they say he lost no wages by reason of

what they call "excessive picketing". This contention is based on two theories; the first being their claim that over 400 of the 550 hourly-paid employees of the company voted to strike and participated in the picketing, which they claim shows that so many employees voluntarily refrained from working that the plant could not have been operated; and the second theory being that the company agreed in the event of a strike that hourly-paid employees would not work during the strike. See Petitioners' Brief, pp. 9-10.

The evidence pertaining to both these contentions was in sharp conflict.

### **The Absurdity of Petitioners' Contentions.**

The absurdity of the contention that management agreed to close the plant and not to admit hourly-paid employees, and the equal absurdity of the other contention that work was not available to the plaintiff at the time he was denied access to the plant, becomes obvious when those contentions are weighed against the wholly inconsistent conduct of the defendants in massing at least two hundred pickets at the only entrance to the plant, and doing whatever the occasion demanded to intimidate the employees who wanted to work so as to keep them out of the plant. If there had been any such agreement or understanding, or if the defendants had been so sure that they had such numerical strength as to be able to close the plant legitimately by the use of their economic power, one picket with one sign would have sufficed. Particularly is this so when it is considered that a part of the claim that Oakes stated to the union committee that the plant would be closed in the event of the strike, is the further very natural incidental claim that it was reported to the second union meeting held on the afternoon before the strike that Oakes had made that statement or agreement. And if any such agreement or under-

standing had been reached, the plaintiff would have been permitted to go through the picket line to the gate of the plant and get that information first hand. And if there had not been enough employees present at the picket line, who wanted to work, to operate the plant, the defendants would not have resorted to the tactics which they used in order to prevent their going in. No matter how many witnesses may have sworn to the making of such an agreement, and no matter how many employees the defendants' witnesses may have sworn belonged to the union and were participating in the strike, these considerations reveal the glaring infirmity of such testimony and destroy its probative value.

Another circumstance which strongly refutes the claim that so many employees voluntarily refrained from working that the employer could not have operated the plant, is that, when the State Highway Patrol had arrived at the scene of the picketing to preserve order and to keep the street open, approximately two hundred thirty hourly-rated employees entered the plant and worked (R. 37-38), although the pickets were again present in their initial force (R. 328).

Examination of the record references cited by petitioners to support their statement that over four hundred voluntarily voted to strike and participated in the picketing shows that the statement is based on mere estimates.<sup>5</sup>

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<sup>5</sup> For instance, petitioners state on page 9 of their brief that over 400 employees voted to strike and participated in the picketing, and cite in support of that pages 504 and 507 of the record and page 13a of their appendix. Pages 504 and 507 of the record show Duncan testified that in the first union meeting on the day before the strike better than 100 persons were present, and that in the other better than 250 persons attended. The references to the record to support the similar statement in the appendix show Drake testified that there were 150 present at the first meeting, Hovis testified that there were over 100 present at the first meeting and around 300 present at the second meeting, and Dyar testified that there were at least 250 present at the second meeting. Contrasted

Aside from the foregoing, this argument of the defendants entirely ignores the consideration that even though the jury may have thought the plaintiff was the only employee who wanted to work, it could very reasonably have inferred that work was available to him from the mere fact that he was a maintenance electrician and that when he was not busy with special assignments, he worked on general overall maintenance (R. 18, 45). Certainly, in a plant of sufficient magnitude to employ five hundred fifty hourly-paid employees, there would have been enough overall maintenance work to occupy the plaintiff if he had been able to enter the plant.

### **Conflict in the Evidence.**

While five witnesses for the defendants did testify that at a meeting between the union committee and the company committee the day before the strike, Frank W. Oakes, the spokesman for the company committee, told the union committee that in the event of a strike the plant would be closed to hourly-rated employees (R. 287, 317, 463, 487, 506), Oakes disputed this and denied that he was told that the plant would be struck at 8:00 o'clock on July 18, and further denied that he told the union committee that the company would lock its gates against hourly employees and not admit them to the plant (R. 599).<sup>6</sup> Illus-

with these estimates is the testimony of Dobbs that 100 were present at the second meeting (R. 241), which, added to the 100 present at the first meeting, makes a total of 200 union members at these two meetings. That total is not far different from plaintiff's estimate of 25 or 30 persons walking in the circle on the picket line, reinforced by a group of 100 to 150 on one side of the street and a group of 50 on the other side of the street, which estimates were in keeping with his other estimate that there were approximately 200 persons present in the vicinity of the picket line prepared to go to work.

<sup>6</sup> Heretofore petitioners have made the highly technical contention that Oakes did not deny the testimony of the union witnesses because of the particular wording of the question put to him, viz.:

trating that the testimony of Oakes was entitled to more credence than that of the members of the union committee, is the fact that three of the members of the union committee specifically denied that Volk was present at the meeting (R. 330, 497, 514), and another of them was asked to name all persons present and did not mention Volk (R. 309). On the other hand, Oakes said that Volk was present at the meeting and produced the company's gate register (R. 597), showing that Volk signed into the plant with the others at the time this meeting was held, and Oakes testified that in the conference Duncan said that in the event of a strike the union would admit management and salaried employees to the plant, and Volk added to that statement, "At least at the start" (R. 599). Further corroboration of Oakes is found in the fact that the defendants' witnesses Drake, Hovis and Starling testified that it was reported to the second union meeting that the company had agreed that it would not admit hourly-rated employees to the plant in the event of a strike (R. 288, 489, 400), but the plaintiff's witness Dobbs, who was present at the meeting, testified that no such statement was made at the meeting (R. 244).

"Did you or any of your associates state to the union committee at that time and place that the company would lock its gates against hourly employees and not admit them to the plant?" (R. 599.) The particular form which the question took is attributable to the fact that in examining Oakes as a witness the plaintiff was rebutting expressions used by several of defendants' witnesses. For example, one member of the union committee testified that Mr. Oakes said, "The gates would be closed to hourly-rated employees" (R. 463); and the defendants' witness Bowling testified that he was advised by his foreman that "The gates are going to be locked until this thing is settled" (R. 356); and the defendants' witness Bradshaw testified his foreman said to him, "They're going to have the gates locked, but they're going to let the foremen and personnel in, salaried employees in," and also that a superintendent told him, "I am sure glad they are locking the gate because we've all got to work together when this thing is over" (R. 372). In this connection the gatekeeper testified that the gates were not locked but were kept open, and that there was no change in his standing instructions applicable to the admission of employees to the plant (R. 276-277).

In petitioners' statement of the case, Petitioners' Brief, page 10, it is said that A. J. Babis, a company foreman, testified that he had advised employees under his supervision that they would not work during the strike and that he had been advised that the plant would remain closed to hourly-paid employees for the duration of the strike because of a discussion between the company and the union, and that several employees testified that they received similar instructions from their supervisors prior to the time the strike began. One answer in the nebulous testimony of Babis when taken out of context, possibly justifies that statement, but a reading of the entire testimony of the witness (R. 266-276) is persuasive to the conclusion that he could recall only that he had heard some talk concerning whether or not the plant would operate in the event of a strike, and could not recall who had done the talking or the substance of what was said. It is true that janitors, Garth and Burks, testified that their foreman told them on the morning of the strike to go home because the plant was going to close down, but this testimony was categorically denied by their foreman, Hughes (R. 613-614), and that W. A. Bowling testified that an assistant foreman told him that "the gates are going to be locked until this thing is settled" (R. 356), but the inherent improbability of his testimony was shown by his cross-examination (R. 358-359). It is also true that Clifford Corum and Howard Goodlett testified that their foreman, A. J. Crites, advised them that the plant would be closed during the strike, but Mr. Crites categorically denied this (R. 608-609).

These portions of the evidence clearly point up the situation that in all of the important factual issues in this case, the evidence was in such irreconcilable conflict as to render it particularly appropriate for a jury, the traditional trier of the facts, to discard falsity and accept truth and thus to ferret the facts out of the incongruous mass of testimony.

### III. SUMMARY OF ARGUMENT.

1. This action is a common-law tort action to redress an unlawful invasion of plaintiff's right to engage in a lawful occupation free from unlawful interference. Statutes which invade the common law are presumed to preserve traditional and familiar principles except when a contrary purpose is evident. *Isbrandtsen Co. v. Johnson*, 343 U. S. 779. An act of Congress will not be construed as taking away a common-law right existing at the date of the enactment, or the corresponding remedy for its protection, unless the right is so repugnant to the statute that its survival would deprive the statute of its efficacy and render its provisions nugatory. *Texas & Pacific R. R. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

2. Each question as to whether the jurisdiction of the National Labor Relations Board is so exclusive as to deprive a court or other agency of jurisdiction, is solved by determining the congressional intent. *Guss v. Utah Labor Relations Board*, 353 U. S. 1; *Garner v. Teamsters Union*, 346 U. S. 485.

3. The legislative treatment of secondary boycotts is internal evidence in the Act that Congress intended to preserve the jurisdiction of courts to adjudicate common-law torts growing out of force and violence in labor relations matters. This intent appears from the fact that section 8 (b) (4) of the Act condemned certain secondary boycotts as unfair labor practices, and section 10 conferred on the Board power to prevent them, but section 303 provided that damages arising from them could be recovered by action at law brought in either a state or federal court. This shows that Congress intended that the courts, rather than the Board, be the instrumentalities of government with power to award damages arising from unfair labor practices, and, coupled with the fact that there was no

necessity for Congress to make special provision for a universally recognized right of action such as the instant one, as there was in the case of secondary boycotts, some of which at common law in some jurisdictions did not furnish a right of action, reveals the congressional intent to preserve common-law tort actions such as this, and, of course, the traditional jurisdiction of the courts to entertain them. *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656.

4. The legislative history of section 8 (b) (1) (A) of the Act shows that Congress intended to protect the right of an employee against union restraint or coercion in the exercise of his right to engage in concerted activities, or to refrain therefrom, by supplementing state laws to that end. As to force and violence, the congressional intent was to encourage local law enforcement and to leave intact every available remedy and sanction designed to prevent it or to redress it. This is made abundantly clear from what was said when S. 1126 was reported, when Senator Ball offered the amendment which became section 8 (b) (1) (A) of the Act, during the discussion of the amendment in the Senate, and in the report of the House managers on the bill agreed to by the committee of conference.

A detail in the legislative history of particular significance in demonstrating that Congress specifically intended for actions such as this to survive and be available, is that section 12 (b) of the House bill, H. R. 3020, expressly provided for the bringing of such actions in the federal district courts without regard to the amount in controversy. In House Conference Report No. 510 on H. R. 3020, p. 42, it was stated that the bill agreed to by the committee of conference did not embody the specific provision which was section 12 (b) in the House bill, but that the effect was substantially the same, since unions were suable and could be subjected to liability for wrongful conduct under ordinary principles of law.

5. The power of the states to deal with force and violence in labor relations matters was not diminished by the National Labor Relations Act or the Labor Management Relations Act, 1947. *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, 351 U. S. 266; *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656; *Garner v. Teamsters Union*, 346 U. S. 485; *International Union, UAW-AFL, v. Wisconsin Employment Relations Board*, 336 U. S. 245; *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740.

6. The power left to the states to control force and violence in labor relations matters includes the power to prevent such conduct, to prosecute offenders criminally, and through their courts to redress wrongs characterized by such conduct by common-law tort actions for the recovery of both compensatory and punitive damages. *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, 351 U. S. 266; *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656.

7. Any person can file a charge of an unfair labor practice and thereby set in motion the administrative procedure of the Board. 29 U. S. C., § 160 (b); 29 CFR, 1955 Cum. Supp., § 102.9; *Local Union No. 25 of International Brotherhood of Teamsters v. New York, New Haven & H. R. Company*, 350 U. S. 155; *National Labor Relations Board v. Indiana & Michigan Electric Company*, 318 U. S. 9. Laburnum Construction Corporation in the situation confronting it, could have availed itself of that administrative remedy. That it was allowed to maintain its common-law tort action for damages, shows that the administrative remedy was not exclusive. *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656.

8. Section 8 (b) (1) of the Act was not designed to be the exclusive method of dealing with violence and the states may control violence by a remedy which duplicates a remedy within the jurisdiction of the Board. *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, 351 U. S. 266.

9. The Board has no power or jurisdiction to award damages to an employee in the form of lost wages to compensate him for the injury sustained by him by being denied access to his place of employment by force and violence. *Colonial Hardwood Flooring Company*, 84 N. L. R. B. 563; *United Mine Workers*, 92 N. L. R. B. 916; *Local 983, United Brotherhood of Carpenters*, 115 N. L. R. B. 1123; *United Electrical, Radio & Machine Workers, Local 1412*, 95 N. L. R. B. 391. See *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656; *Progressive Mine Workers of America v. National Labor Relations Board*, 7 Cir., 187 F. 2d 298, at 307; *National Maritime Union of America*, 78 N. L. R. B. 971.

10. Reason and justice suggest the affirmance of the judgment below. The maintenance of an action of this kind cannot interfere with any function of the Board. The defendants were not deprived of any right conferred upon them by the Act. The decision in this case will rule similar cases where the injuries may be more serious than the injury of this plaintiff. The defendants can avoid similar judgments by obeying the law and by refraining from mass picketing and violence. The defendants should be responsible for their torts. To grant them immunity from liability would license and encourage the grossest sort of abuse. The remedy granted here, therefore, serves not only as a wholesome and restraining influence on labor unions which will eventually inure to their benefit, but also furnishes the protection against invasion of the rights of every individual which it is one of the first duties of government to provide.

#### IV. ARGUMENT.

##### Presumption Against Elimination of Common-Law Right.

The National Labor Relations Act as amended by the Labor Management Relations Act, 1947, does not in express terms abolish the common-law right on which plaintiff's action is founded, nor deprive any court of jurisdiction to entertain the complaint. If such right was abolished, or what amounts to the same thing, if the court was deprived of such jurisdiction, it was by implication, and the guiding principles to be followed in determining the congressional intent were stated very positively in *Texas & Pacific R. R. v. Abilene Cotton Oil Co.*, 204 U. S. 426, at 436, in these words:

“As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.”

The legislative scheme reflected by the Act, and the common-law right here asserted can coexist harmoniously.

The survival of this right and remedy not only does not "deprive the subsequent statute of its efficacy" nor "render its provisions nugatory," but is in keeping with the congressional intent manifested by the provisions of the Act itself, and frequently during the legislative process by statements of those who were most concerned with writing it.

Reference will be made to some of these indications of congressional will.

**The Legislative Scheme Was to Confer Preventive Power  
on the Board and to Leave the Recovery  
of Damages With the Courts.**

The Act carries internal evidence which unanswerably refutes the contention that Congress intended to deprive courts of jurisdiction to entertain common-law tort actions to recover for loss of wages and mental anguish arising from mass picketing and force and violence on the picket line. This internal evidence appears when section 8 (b) (4) of the Act is compared with section 303.

*Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, and *Capital Service, Inc., v. N. L. R. B.*, 347 U. S. 501, following the lead of *Garner v. Teamsters Union*, 346 U. S. 485, established the exclusiveness of the jurisdiction of the National Labor Relations Board to prevent peaceful picketing constituting a violation of section 8 (b) (4). However, when Congress came to consider the matter of awarding damages resulting from the secondary boycotts proscribed by section 8 (b) (4), it concluded that was a function not to be confided to the expertness of the Board. Congress knew that in the field of awarding damages, the courts, which were the traditional forum for such a matter, were the instrumentalities of government to which that power could

more appropriately be entrusted.<sup>7</sup> Therefore, in subsection (b) of section 303 of the Act, Congress provided that any person injured in his business or property by reason of a violation of subsection (a) of section 303, which for this illustration is identical with section 8 (b) (4), could sue for damages in any court, state or federal, having jurisdiction of the parties.

Congress established rules of conduct by proscribing the types of concerted activity listed in sections 8 (b) (4) and 303 (a) because there was much difference of opinion in various jurisdictions as to the legality of such activities.<sup>8</sup> Because of such difference of opinion, and in order to be sure that such concerted activities would not be legal in any state, Congress established substantive rules of conduct, provided an administrative agency to prevent the violation of the substantive rules, and provided that any person injured by such violation should have the right to recover damages in an appropriate state or federal court, a right not previously existing in some jurisdictions.

The feature of this legislative scheme especially important here is the granting of preventive power to the Board and redressive power to the courts. This legislative scheme so illuminates the question presented in this case as to spotlight the fallacy of the argument made by petitioners that Congress, by proscribing force and violence in

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<sup>7</sup> Senator Taft, discussing his amendment which was adopted as section 303 of the Act, said:

"We considered making it a procedure through the National Labor Relations Board also, but it is not felt I think by any of those on the other side of these questions that the Labor Board is an effective tribunal for the purpose of trying to assess damages in such a case. I do not think anyone felt that particular function should be in the Board." (2 Leg. Hist. Labor Management Relations Act, 1947, p. 1371.)

<sup>8</sup> See the dissent of Mr. Justice Brandeis in *Taux v. Corrigan*, 257 U. S. 312, at 363-364, and footnote 28 discussing the boycott.

picketing as it did in section 8 (b) (1) (A), and by granting the Board the power to prevent that conduct as it did in section 10, intended to take away from the courts their traditional jurisdiction to redress such a tort, and to entrust that power exclusively to "the skilled and professional discernment"<sup>9</sup> of an "expert agency."<sup>10</sup> If Congress was willing to trust the solution of the extremely complex and difficult problems presented by section 303 to the "opinions and prejudices of the jurors in the thousands of state trial courts throughout the nation,"<sup>11</sup> with the risk of "thousands of varying interpretations by a myriad of state trial courts and juries,"<sup>12</sup> then certainly it was willing to leave intact the traditional jurisdiction of these same courts to solve and adjudicate the relatively simple question involved in this action, namely, whether or not Paul Russell was denied access to his place of employment, and caused to lose wages, by the massing of pickets entirely across, and on both sides of the only street furnishing access to the plant, which pickets blocked his way, not only by the force of their number, but with shouted threats to turn him over. It does not require an expert in the field of labor relations to conclude that picketing is accompanied by force and violence, and the threat thereof, when pickets mass in front of an employee, not only blocking his way, but threatening to turn his car over. It does not require an expert to decide that force and violence were involved when pickets, in order to keep McLemore out of the plant, grabbed him by the arm and threatened him with the remark that they didn't want to have any trouble out of him. It does not require an expert to find

<sup>9</sup> Brief for petitioners, p. 65.

<sup>10</sup> Brief for petitioners, p. 63.

<sup>11</sup> Brief for petitioners, p. 62.

<sup>12</sup> Brief for petitioners, p. 63.

that a union is responsible for such unlawful conduct when its regional director, assistant regional director and international representative, its three highest officers located in the area involved, appear on the picket line and supervise and encourage such conduct, and when the regional director tells the plaintiff, as he approaches the picket line, that if he is a salaried employee he can go on into the plant, but that if he is hourly-paid that is as far as he can go. Any jury in any court in any state is fully capable of discerning that such conduct was not peaceful picketing, and that it was effective to frustrate the purpose of the numerous employees who approached the picket line with their lunches with them ready to do their work as usual. Any jury with any sort of intelligence would reasonably conclude from that conduct, and from the unrelenting purpose to keep every production and maintenance employee out of the plant, that work was available, especially so, when it is considered that a month later, when law and order had been restored, approximately 230 employees entered the plant and operated it that day and continuously thereafter.

It may be appropriate to observe in this connection that no implication against the existence of the cause of action asserted in this suit should be indulged because of the fact that Congress did not specifically provide for it, but did provide for suits of the type specified in section 303 of the Act. It was not necessary to provide for a suit such as this one filed by this plaintiff, because such conduct as these defendants engaged in was tortious in every civilized state and a corresponding remedy to redress it followed as a matter of course.<sup>13</sup> Therefore, it was not necessary that Congress make any provision for an action of this

<sup>13</sup> "It is a fixed principle of the common law, that if a right exists, an appropriate remedy for its enforcement necessarily follows as an incident." *Janney v. Buell*, 55 Ala. 408, at 410. See cases cited, footnote 18, *infra*, page 39.

nature, as it was in the case of the secondary boycotts dealt with in section 303.

Specific support for these thoughts is found in *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, at 665, as follows:

"One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages in any Federal District Court and 'in any other court having jurisdiction of the parties.' By this provision, the Act assures uniformity, otherwise lacking, in rights of recovery in the state courts and grants jurisdiction to the federal courts without respect to the amount in controversy. To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us."

### **Legislative History.**

In the Eightieth Congress, First Session, both the House of Representatives and the Senate were concerned with labor relations bills. The House bill was designated as H. R. 3020 and the Senate bill as S. 1126. On April 17, 1947, the House passed H. R. 3020 and sent it to the Senate. 1 Leg. Hist., Labor Management Relations Act, 1947,

p. 863; 2 op. cit., p. 1002. On May 13, 1947, the Senate proceeded to consider H. R. 8020 and amended it by striking all of it after the enacting clause, and by inserting in lieu thereof the text of S. 1126 as amended, which had been given full consideration in the Senate. *Id.*, p. 1522. A committee of conference resolved the differences between the two houses and its report was agreed to by the House and the Senate. 1 Leg. Hist., Labor Management Relations Act, 1947, p. 899; 2 op. cit., pp. 1619-1621. Section 8 (b) (1) (A), the provision of the Act here particularly material, derived from the Senate bill, and therefore we find most of its legislative history in the proceedings in the Senate.

The extracts hereinafter quoted from the legislative history of Section 8 (b) (1) (A) of the Act clearly demonstrate that it was not intended to oust the states of jurisdiction over force and violence on the picket line. Both the proponents and the opponents of the amendment which became Section 8 (b) (1) (A) of the Act made many statements revealing their thoughts that the amendment would not in any wise impair the power of states to control and prohibit mass picketing and force and violence. There was frequent expression of the view that the power of the National Labor Relations Board to prevent the unfair labor practice proscribed in Section 8 (b) (1) (A) would supplement rather than supersede the power of the states in this respect.

Along with Senate Report 105 of the Senate Committee on Labor and Public Welfare on S. 1126, Senator Taft, the chairman of the committee, and Senators Ball, Donnell, Jenner, and H. Alexander Smith, members of the committee, filed their supplemental views stating their intention to offer on the Senate floor, or to support four proposed amendments to S. 1126. One of the amendments was that which, with slight modification became section 8 (b) (1) (A) of the National Labor Relations Act as amended. Con-

cerning this proposed amendment, the supplemental statement of Senator Taft and his colleagues was:

"The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under State law, but we see no reason why they should not *also* constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act" (1 Leg. Hist., Labor Management Relations Act, 1947, p. 456; emphasis supplied).<sup>14</sup>

Thus, in the very beginning, did the sponsors of the amendment declare that making mass picketing and force and violence an unfair labor practice under the Act, was not to affect the illegal status of such conduct under state law, but that in addition to such illegality, it should also be an unfair labor practice which would deprive the violators of protection under the Act.

On April 25, 1947, Senator Ball, on behalf of himself and Senators Byrd, George and H. Alexander Smith, offered the amendment referred to in the above statement of supplemental views, which became section 8 (b) (1) (A) of the Act. The Senator stated the purpose of the amendment as follows:

"The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises, or false statements, the unions also shall be guilty of unfair labor

<sup>14</sup> Referred to in the *Laburnum* case, 347 U. S., at 668.

practices'' (2 Leg. Hist., Labor Management Relations Act, 1947, p. 1018).

Senator Ball then mentioned several cases to illustrate the type of conduct the amendment was directed against and added:

"The common practice in organization campaigns is for the business agent to threaten all employees and tell them that if they do not join the union before election, or vote for it, they will be charged double initiation fees afterward. That is done in a great many cases. It is clearly an attempt to coerce and threaten employees in the exercise of the freedoms guaranteed by the act. *However, such practices do not fall within the purview of State Laws against violence and that sort of thing.*" (Id., p. 1019; emphasis supplied.)

Then, after mentioning a case where pickets had assaulted and beaten an employee to force him to join a union, the Senator further said:

"That is another type of coercion. If the unions, in their organizing drives, cannot persuade a majority to join voluntarily, they place a picket line in front of the shop, make scurrilous remarks about the employees as they go to work, and subject them to all kinds of abuse, *even verging on physical violence, but very often not reaching the point where State laws would come into effect.*" (Id., pp. 1019-1020; emphasis supplied.)

From those remarks it is clear that it was the purpose of the sponsors of the amendment to supplement state laws against force and violence in labor relations, by proscribing certain conduct falling short of a violation of the laws of the states.

Senator Ives, one of the opponents of the amendment, indicated his recognition of the fact that the adoption of the amendment as a part of the bill would not eliminate the liability of a union under state law for violence and physical coercion when he said:

“Moreover, assuming that these proscribed acts involve violence and physical coercion, the provision is unnecessary, because offenses of this type are punishable under State and local police law. In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under State and once under Federal law” (Id., p. 1021).

During the debate on the amendment, Senator Taft expressly and specifically stated that there should be two remedies for union violence, one under state laws and one under the Act. His language left no doubt as to his concept of the amendment. He said:

“There is no law of any state providing that a man cannot threaten another man that if he does not join a union he may lose his job, or that something may happen to him other than actual physical violence. There are plenty of methods of coercion short of actual physical violence. So that in this section there is no duplication whatever. But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor

Relations Act. *There is no reason in the world why there should not be two remedies for an act of this kind*" (Id., p. 1031).<sup>15</sup>

Senator Taft further said:

"Mr. President, I should like to call attention to the fact that the amendment proposed by the Senator from Minnesota (Mr. Ball) is practically contained in the Wisconsin Labor Relations Act and has been used in Wisconsin as a means not only of preventing the coercion of employees, but also of attempting, bringing such action as can be brought by administrative law, to end mass picketing. Of course, if administrative law fails, it would be necessary finally to resort to the police powers of the States" (Id., p. 1032).

There again did Senator Taft make clear that the adoption of the amendment would not deprive the states of their police power to prevent mass picketing, and that the power being conferred upon the Board to prohibit mass picketing as an unfair labor practice was supplementary to the power of the states.

Later in the debate, Senator Ball went so far as to urge as a consideration in support of the proposed amendment, that for the federal government to condemn force and violence would *encourage good local law enforcement* to prevent coercion. His argument was:

"The only laws we have had restrain employers and not unions. So it may well be that many of the types of activities of unions which we are seeking to restrain somewhat by this mild amendment are the kind of activities which would be corrected by good local law enforcement. *But I think we shall encourage that kind of local law enforcement if the Federal Gov-*

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<sup>15</sup> Referred to in the *Laburnum* case, 347 U. S., at 668.

ernment, acting through Congress, states clearly its position that individual employees are entitled to their right of self-organization free from coercion from any source, whether it be the employer, the union, or some outside source" (Id., p. 1200; emphasis supplied).

That there was no thought that the adoption of the amendment would remove force and violence and mass picketing from the control of the states is shown by the following colloquy between Senator Ives and Senator Ball:

"Mr. Ives: It is the Senator's idea that machinery would be established under the control of the National Labor Relations Board to stop mass picketing?

Mr. Ball: No; of course not.

Mr. Ives: The Senator's idea is to have the police power of the Federal Government exercised?

Mr. Ball: No. But I think that a mass picket line would be an unfair labor practice. We would not stop it, of course. The Senator knows that the process of filing an unfair labor practice charge and getting a hearing before the Board would be a completely impractical way of dealing with a mass picket line. It might perhaps restrain unions in the use of the particular weapon, and I think that would be all to the good. It might discourage them a little, because it would be an unfair practice" (Id., p. 1202).

Senator Taft again expressed the thought that duplication of State laws was no valid objection to the amendment where violence was involved, when he said:

"The Senator from Oregon a while ago said that the enactment of this proposed legislation will result in duplication of some of the State laws. It will duplicate some of the State laws only to the extent, as I see it, that actual violence is involved in the threat or in the operation."

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“\* \* \* The Senator is suggesting that the enactment of this proposed legislation will bring about a condition which will compel the local court to do its duty. If that will be the result, I believe it will be a beneficial effect.”

“\* \* \* Mr. President, I may say further that one of the arguments has suggested that in case this provision covered violence it duplicated State law. I wish to point out that the provisions agreed to by the committee covering unfair labor practices on the part of labor unions also might duplicate to some extent that **State law**. **Secondary boycotts, jurisdictional strikes, and so forth, may involve some violation of State law respecting violence which may be criminal, and so to some extent the measure may be duplicating the remedy existing under State law. But that, in my opinion, is no valid argument**” (Id., p. 1208).

The Ball Amendment which became section 8 (b) (1) (A) of the Act was adopted on May 2, 1947 (Id., p. 1217).

A detail in the legislative history of the Act particularly significant in showing that there was no intention to eliminate common-law tort actions arising from mass picketing and force and violence occurring on the picket line, is the difference in the treatment of such conduct under the House bill and the bill recommended by the conference committee and agreed to by the House and Senate. Section 12 (a) (1) of H. R. 3020, as reported by the House Committee on Education and Labor and as the bill passed the House, provided that it was an unlawful concerted activity by the use of force, violence, physical obstruction, or threats thereof, to prevent any individual from entering upon an employer's premises. Section 12 (b) of the bill provided that any person injured in his business, person or property by such an unlawful concerted activity affecting commerce, could sue the persons responsible there-

for in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and recover the damages sustained by him, together with the cost of the suit and a reasonable attorney's fee. 1 Leg. Hist., Labor Management Relations Act, 1947, pp. 77-79, 204-206. In this connection House Conference Report No. 510 on H. R. 3020, p. 42, states:

"Under the new section 8 (b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:

(1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12 (a) (1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12 (a). While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, participation in them, as explained in the discussion of section 7, is not a protected activity under the act. Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement, while adopting section 8 (b) (1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to reinstatement. Furthermore, since in section 302 (b),

unions are made suable, *unions that engage in these practices to the injury of another may subject themselves to liability under ordinary principles of law.*" (1 Leg. Hist., Labor Management Relations Act, 1947, p. 546.)

While the reference to section "302 (b)" in the last sentence of the above quotation was likely intended to be section 301 (b) and while there is doubt and disagreement as to the meaning and effect of that section,<sup>16</sup> the gist of that portion of the report is that irrespective of the differences in the bill recommended by the conferees and the bill which the House had previously passed, the effect of such conduct was the same under both bills, because unions were suable and were liable under "ordinary principles of law," meaning, of course, the common law. The essence of the report of the conferees to the House was that, since unions were suable, they could be subjected under the common law to liability for damages arising from preventing an employee from entering his place of employment, and it was not necessary that the bill contain a specific provision to that effect, such as section 12 (b) of H. R. 3020 as it passed the House.

Another indication of congressional intent is gained from the fact that the National Labor Relations Act, § 10 (a), referring to the power of the Board to prevent unfair labor practices, specifically provided, "This power shall be exclusive" and that the 1947 amendment eliminated the phrase "shall be exclusive." 2 Leg. Hist., Labor Management Relations Act, 1947, pp. 1661, 1673. The effect of this omission was stated in House Conference Report No. 510, p. 52, in this way:

"By retaining the language which provides the Board's powers under section 10 shall not be affected

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<sup>16</sup> *Textile Workers Union v. Lincoln Mills of Alabama*, U. S. ...., 77 S. Ct. 912.

by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." 11 *op. cit.*, p. 556.)<sup>17</sup>

The conclusions reasonably drawn from the portions of the legislative history of Section 8 (b) (1) (A) catalogued above are:

(1) That Congress not only did not entertain any thought of withdrawing or limiting the plenary power of the states to deal with force, violence and mass picketing, but on the other hand, intended that state power should remain intact, and that the use of this power would be encouraged by congressional condemnation of such conduct;

(2) That the power of the Board to issue a cease and desist order against the unfair labor practice defined in Section 8 (b) (1) (A), together with court enforcement of that order and the possibility of a contempt citation, was not considered by the Congress as an effective method of preventing mass picketing and force and violence, and was therefore not intended as a substitute for state action; and

(3) That the cease and desist procedure and the loss of rights under the Act by transgressors, were the only federal remedies for, or sanctions against that type of conduct envisaged by the Congress.

### **The Decisions of the Court.**

In every case presented to it since the enactment of the National Labor Relations Act, involving a question as to the exclusiveness of the jurisdiction of the Board, the

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<sup>17</sup> Referred to in the *Laburnum* case, 347 U. S., at 667, footnote 9; and in the *Kohler* case, 351 U. S., at 271, footnote 8.

Court has exhibited a thorough understanding of the congressional intent demonstrated by the foregoing expressions and indications, and has admirably fashioned its decisions and opinions so as to give effect to that intent, and so as to add another branch fitting symmetrically to the body of the law pertaining to the proper relationship between the states and the federal government and their respective areas of action.

### **Force and Violence.**

These decisions and opinions have established beyond peradventure that the plenary power of the states to deal with force and violence in any appropriate manner was not impaired in the slightest degree by the enactment of either the National Labor Relations Act or the Labor Management Relations Act, 1947. The Court has sustained state power and jurisdiction against the pre-emption claim in every case in which the conduct dealt with by the state was characterized by force and violence.

### **The Laburnum Case.**

*United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, is the case most similar to the instant case and, we submit, is controlling here.

The first paragraph of the opinion in the *Laburnum* case states the question there involved and the Court's answer to it as follows:

"The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act." For the reasons hereafter stated, we hold that it has not. (347 U. S. at 657.)

Preventing employees from engaging in their work by threats of the use of force and violence was the wrongful conduct which was made the basis of the action in the *Laburnum* case. Preventing the plaintiff in the present case from engaging in his work by blocking his access to his place of employment by means of mass picketing, by taking hold of his car and stopping it, and by threats of bodily harm to him and damage to his property, is the wrongful conduct charged to these petitioners and their confederates.

The wrongful conduct which was the basis of the common-law tort action in the *Laburnum* case, like the wrongful conduct which is the basis of the instant common-law tort action, was an unfair labor practice proscribed by section 8 (b) (1) (A) of the Act.

The tort in the *Laburnum* case, like the tort in the instant case was the wrongful interference with the right to engage in a lawful business or occupation.<sup>18</sup>

The recovery of the plaintiff in the *Laburnum* case, like that of the plaintiff here, included both compensatory and punitive damages.

Notwithstanding these identities, petitioners claim there is a distinction between the instant case and the *Laburnum* case because the plaintiff here is an *employee*, while the

<sup>18</sup> *Sparks v. McCrary*, 156 Ala. 382, 47 So. 332; *United States Fidelity & Guaranty Co. v. Millonas*, 206 Ala. 147, 89 So. 732; *Bowen v. Morris*, 219 Ala. 689, 123 So. 222; *Hill Grocery Co. v. Carroll*, 223 Ala. 376, 136 So. 789; *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So. 2d 383; *Evans v. Swaim*, 245 Ala. 641, 18 So. 2d 400; *Local 204 of Textile Workers Union of America v. Richardson*, 245 Ala. 37, 15 So. 2d 578; *Brennan v. United Hatters*, 73 N. J. L. 729, 65 Atl. 165; *Sweetman v. Barrères*, 263 Mass. 349, 161 N. E. 272; *Chambers v. Probst*, 145 Ky. 381, 140 S. W. 572; *Chipley v. Atkinson*, 23 Fla. 206, 1 So. 934; *Wortex Mills v. Textile Workers Union*, 380 Pa. 3, 109 Atl. 2d 815; *Mische v. Kaminski*, 127 Pa. Super. 66, 193 Atl. 410; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96; *Luck v. Clothing Cutters' & T. Assembly*, 77 Md. 396, 26 Atl. 505.

plaintiff in the *Laburnum* case was an employer, "whose rights" petitioners say, "are not attempted to be protected by Congress in Section 7 of the National Labor Relations Act, and whose rights when violated cannot be redressed under Section 8 (b) (1) of the National Labor Relations Act," while the plaintiff here, they say, has a specific remedy for the violation of his rights. See Petitioners' Brief, pages 41-44.

If the Court had intended the *Laburnum* case to rest on the narrow basis asserted by petitioners that the Act did not protect employers' rights, certainly it would have said that, rather than have left it to the ingenuity of counsel to discern that as the rationale of the decision. Certainly, if that had been the view of the Court, Mr. Justice Burton was fully capable of giving articulate expression to such a simple idea. If that had been the thought of the Court, we would not find in its opinion this paragraph:

"The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct. It sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances affecting interstate commerce. The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of congressional disapproval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices" (347 U. S. at 666).

If petitioners are correct in their view of what was held in the *Laburnum* case, certainly the Court wasted time and

effort in setting out the history of the Labor Management Relations Act, and in concluding that the provision of section 303 of the Act providing for actions for damages resulting from secondary boycotts was "consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally" but that it would be inconsistent to say that "without express mention of it Congress abolishes all common-law rights to recover damages" (347 U. S. at 666).

It is interesting to note that the Court acted advisedly in not placing the *Laburnum* decision on the narrow basis claimed by petitioners. Counsel for Laburnum Construction Corporation in their brief in that case suggested the exact theory advanced by petitioners here,<sup>19</sup> but the Court deemed it appropriate to rest the decision on the broader, sounder ground so persuasively and logically stated in the opinion to the effect that Congress did not intend to eliminate common-law actions to recover damages for tortious conduct, though such conduct also constituted an unfair labor practice.

One of the most important statements in the *Laburnum* opinion is this:

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<sup>19</sup> Brief of Respondent in the *Laburnum* case, pages 11-12, summarized part of the argument as follows:

"The subject of this proceeding is not the wrong to the employees, but the right of a company to conduct its business in a peaceful manner free from violence and unlawful interference.

"The Labor Management Relations Act of 1947 is not concerned with this right and therefore cannot be said to have eliminated it.

"Even if Petitioners' acts were unfair labor practices within the intendment of section 8 (b) (1) (A) as to Laburnum's employees, they were not unfair labor practices to Laburnum, the only plaintiff in this case. The rights of Laburnum are not within the intent or the language of the Act and the states are free to apply their own remedy for the damages caused by Petitioners."

“The language declaring the congressional policy against such practices is phrased in terms of their prevention:

[Quotation of section 10 (a) omitted.]

“Section 10 (c) directs the Board to issue a cease-and-desist order after an appropriate finding of fact. There is no declaration that this procedure is to be exclusive” (347 U. S., at 667).

### **Laburnum Construction Corporation Had an Administrative Remedy.**

The fallacy of petitioners' attempted distinction readily appears from the consideration that Laburnum Construction Corporation could have availed itself of an administrative remedy under the Act, even though it was an employer. Any person, whether he be employer, employee or a stranger, whether he be the injured party or a party having no interest whatsoever, and irrespective of his motive, can file a charge that an unfair labor practice has been committed and thereby put in motion the investigative and preventive machinery of the Board.<sup>20</sup> Laburnum Construction Corporation in the situation with which it was confronted, could have put in motion the preventive procedure of the Board to require the labor organization which was coercing and intimidating its employees to cease and desist from such unfair labor practice. Mr. Justice Douglas pointed this out in his dissenting opinion in *United Auto-*

<sup>20</sup> 29 U. S. C., § 160 (b).; National Labor Relations Board, Part 102—Rules and Regulations, Series 6, § 102.9; 29 CFR, 1955 Cum. Supp., § 102.9; *Local Union No. 25 of International Brotherhood of Teamsters v. New York, New Haven & H. R. Company*, 350 U. S. 155; *National Labor Relations Board v. Indiana & Michigan Electric Company*, 318 U. S. 9, 17-19; *National Labor Relations Board v. Fulton Bag & Cotton Mills*, 10 Cir., 180 F. 2d 68, 70-71; *National Labor Relations Board v. General Shoe Corporation*, 6 Cir., 192 F. 2d 504, 505; *Duro Test Corporation*, 81 N. L. R. B. 976.

*mobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, 351 U. S. 266, at 275, where in referring to the *Laburnum* case he wrote:

“We there are allowed a common-law tort action for damages to be enforced in a state court for the same acts that could have been the basis for administrative relief under the Federal Act.”

The reports of the decisions of the Board are full of instances in which employers have invoked the jurisdiction of the Board to protect their employees from the violent and coercive unfair labor practices condemned in section 8 (b) (1) (A) of the Act.<sup>21</sup>

### **Rights of Employer Are Protected by Act.**

Petitioners blind themselves to reality when they say that section 8 (b) (1) (A) as related to section 7 of the Act protects the rights of employees only. It is a very valuable right of an employer for his employees to have unimpeded access to their place of employment, free from coercion, intimidation and annoyance. That thought was expressed by Mr. Chief Justice Taft in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, at 204, in which, in speaking of annoyance, intimidation and obstruction, he said:

“ \* \* \* From all of this the person (employee) sought to be influenced has a right to be free *and his employer has a right to have him free.*” (Emphasis and parenthesis supplied.)

<sup>21</sup> A few illustrations are: *Sunset Line & Towing Co.*, 79 N. L. R. B. 1487; *Perry Norvell Company*, 80 N. L. R. B. 225; *United Furniture Workers of America*, 81 N. L. R. B. 886; *Colonial Hardwood Flooring Company*, 84 N. L. R. B. 563; *Cory Corporation*, 84 N. L. R. B. 972; *Fairmount Construction Company*, 95 N. L. R. B. 969.

A quarter of a century later, in the United States Senate the son of that Chief Justice, speaking specifically on the subject of the amendment which became section 8 (b) (1) (A) of the Act and which was designed in part to protect an employee from annoyance and intimidation and obstruction of his right of access to his place of employment, pointed out that such right of the employee redounds to the benefit of the employer, saying:

“Mr. President, the amendment is founded on what I consider to be the basic theory of the entire bill, that is, an attempt to create equality between the employer and the employee. If anyone can point to anything in the bill which would impose on the labor union something not imposed upon the employer, certainly I would be in favor of amending it to create equality.” (2 Leg. Hist., Labor Management Relations Act, 1947, p. 1206.)

And so, while sections 7 and 8 (b) (1) (A) are couched in terms of employee rights and restraint of such rights, Congress was in those sections also protecting the right of the employer to have his employees free from restraint and coercion.

### **Comparative Violence.**

The petitioners make a last effort to avoid the impact of the *Laburnum* case by speculating “that the Court would have reached a different conclusion in the *Laburnum* case had the union conduct in the case involved borderline activity \* \* \* rather than extreme violence”, and by saying that the “instant case involves at most a voluntary mass demonstration to show support by employees.” Petitioners’ Brief, page 44. In other words, the petitioners say they were not so bad as the construction workers. We have stated enough of the evidence in this case to show that petitioners characterize their conduct in exceedingly mild terms. Unquestionably their conduct carried with

it a serious threat and was effective to completely seal off the plant to production and maintenance workers. Their conduct was fraught with enough danger to convince the duly constituted authorities that approximately 75 state highway patrolmen and 20 city policemen were necessary to control it. The defendants cannot escape responsibility on any doctrine of comparative violence.

### **The Kohler Case.**

*United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, 351 U. S. 266, gave effect to the congressional intent that there be no curtailment of state jurisdiction over force and violence, even though to do so required the holding that the state could duplicate the preventive power of the Board. Notwithstanding the potential conflict between the state and federal procedures and remedies, the Court sustained the state action because that was so clearly demanded by the congressional will. The focal point of the decision is expressed in this manner:

“It seems obvious that § 8 (b) (1) was not to be the exclusive method of controlling violence even against *employees*, much less violence interfering with others approaching an area where a strike was in progress.” (351 U. S. at 272; emphasis supplied.)

Furthermore, the Court rejected the contention that the references to state power in the congressional debate pertained only to state criminal laws against violence and coercion.<sup>22</sup>

The breadth of the opinion in the *Kohler* case is shown by this passage:

“There is no reason to re-examine the opinions in which this Court has dealt with problems involving

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<sup>22</sup> 351 U. S. at 273.

federal-state jurisdiction over industrial controversies. They have been adequately summarized in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468, 474-477, 75 S. Ct. 480, 484-486, 99 L. ed. 546. As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct which has been made an "unfair labor practice" under the federal Statutes.' *Id.*, 348 U. S. at page 475, 75 S. Ct. at page 485, and cases cited. But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence." (351 U. S. at 274.)

### **Decisions Involving Peaceful Conduct.**

The importance which the Court has attached to the nature of the union conduct also appears from its opinions in cases concerned with peaceful conduct. For instance, in *Garner v. Teamsters Union*, 346 U. S. 485, at 488, the Court was careful to point out:

" \* \* \* Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes."

Likewise in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468 at 481-482, the Court called attention to an ambiguity in the decree of the state court as to whether the "conduct amounted to the kind of mass picketing and overt threats of violence which under the Allen-Bradley Local case give the state court jurisdiction".

## Board Lacks Jurisdiction To Award Damages.

In order to give any semblance of plausibility to their argument, petitioners must and do contend that the National Labor Relations Board has power and jurisdiction to award damages to an employee who has been prevented from engaging in his occupation by mass picketing, force and violence.

In view of the holding in the *Kohler Company* case that section 8 (b) (1) was not intended to be the exclusive method of dealing with violence, the existence of such alleged power of the Board to award back pay to an employee injured by a violation of that section would not oust the jurisdiction of the state court.

Aside from this, contentions that it has power to award damages in cases identical to this case have been consistently rejected by the Board.<sup>23</sup> This administrative

<sup>23</sup> *Colonial Hardwood Flooring Company*, 84 N. L. R. B. 563; *United Mine Workers*, 92 N. L. R. B. 916; *Local 983, United Brotherhood of Carpenters*, 115 N. L. R. B. 1123; *United Electrical, Radio & Machine Workers; Local 1112*, 95 N. L. R. B. 391. And see *National Maritime Union of America*, 78 N. L. R. B. 971, which contains an excellent discussion of the question, and points out the view entertained by the Congress during its consideration of the Act that the Congress regarded the Board as a tribunal without jurisdiction to adjudicate claims for damages, compensatory or punitive. The disclaimer of this jurisdiction by the Board was approved in *Progressive Mine Workers of America v. National Labor Relations Board*, 7 Cir., 187 F. 2d 298, at 307. The reasoning of the Board in *Colonial Hardwood Flooring Company*, supra, is not inconsistent with the reasoning of this Court in *Phelps-Dodge Corporation v. N. L. R. B.*, 313 U. S. 177, as is contended; what the Court there wrote was in rejecting the contention that the Board lacked power to order the employer to employ a person who had not theretofore been in its employment because of discrimination in hiring policy, as distinguished from its power to order reinstatement of one once employed, who had been discharged by reason of discrimination. Nor are the above decisions of the Board contrary to *Virginia Electric Power Co. v. N. L. R. B.*, 319 U. S. 533. That was also a discrimination case, and in sustaining the power of the Board to order repayment of union dues withheld for a company-dominated union, the Court likened the order to a back pay order, and expressly forestalled any possible thought that it was "the adjudication of a mass tort" (319 U. S. 533, at 543).

construction of the Act has been acquiesced in by Congress for many years.<sup>24</sup>

According to petitioners' argument, this alleged power and jurisdiction to award damages flows from the portion of section 10 (c) of the Act, giving the Board authority to require any person guilty of an unfair labor practice to take such affirmative action as will effectuate the policies of the Act. We have heretofore pointed out that any person can file a charge of an unfair labor practice with the Board and can thereby set the machinery of the Board in motion to prevent an unfair labor practice. If the argument which petitioners make is sound, then by the same token, the Board had power and jurisdiction to require the labor organization sued in the *Laburnum* case to pay damages to the Laburnum Construction Corporation, because the Board could just as reasonably determine that such requirement would effectuate the policies of the Act, as would the requirement that a labor organization pay damages to an employee whose right to work has been interfered with. The Court in the *Laburnum* case was in complete disagreement with that concept of such broad and far reaching power and jurisdiction of the Board, as is evidenced by its statement that:

"The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrong-

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\* 24 " \* \* \* In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion \* \* \* " *United States v. American Trucking Ass'n, Inc.*, 310 U. S. 534, at 549.

" \* \* \* the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan v. Davis*, 233 U. S. 613, at 627.

fully discharged employees with back pay" (347 U. S. at 665).

The petitioners' reliance on the portion of House Report 245, on H. R. 3020, set out on page 49 of their brief, one of their rare references to legislative history, is founded in error. The sentence of that report on which they rely, namely, "Under this clause the Board may also require a union to reimburse an employee whom it causes to lose pay the amount he loses," had reference to discrimination cases where the union caused the employer to discharge the employee, and could not have been speaking of the liability of a union on account of violent interference with his right of ingress to his place of employment because, as we have seen, pages 34-36, *supra*, section 12 (b) of H. R. 3020, as reported by the House Committee on Education and Labor, provided an action for damages for that type of conduct in the district courts of the United States without regard to the amount in controversy.

Not only does the legislative history of the Act not support petitioners in their contention as to the jurisdiction of the Board, but on the contrary it shows both by what was said, and, probably more convincingly, by what was not said, that there was no intention to confer such power on the Board.

In the debate on Senator Ball's amendment which became section 8 (b) (1) (A), Senator Pepper contended that the amendment would create too great possibility of abuse and that there would be numerous unfounded charges of unfair labor practices which the unions would have to defend against. Senator Taft replied to Senator Pepper and gave his idea of the consequences of a charge of the particular unfair labor practice dealt with in the proposed amendment. He said:

"There will be a hearing as to why they were doing these things, and a cease-and-desist order may be

issued. So far as I know, there is no other penalty. If they should disobey the cease-and-desist order, the Board can obtain an injunction; and if they violate the injunction, they are liable for contempt. That is the *only* result of this general charge of unfair labor practices." (Emphasis supplied; 2 Leg. Hist., Labor Management Relations Act, 1947, p. 1027.)

In a later discussion of this amendment, Senator Taft illustrated by supposing a case of mass picketing preventing employees from entering the plant. He described in detail the procedure by which the Board would handle a charge of unfair labor practice in that situation. What he said is quoted in footnote 13, page 31 of petitioners' brief, and also appears at 2 Leg. Hist., Labor Management Relations Act, 1947, p. 1205.

It is significant that in neither of these statements did Senator Taft refer to any possibility of the Board ordering the employees reimbursed for wages lost by reason of interference with their right of ingress by force and violence, and it is obvious that it never occurred to him that the Board would have power to order the union to compensate employees in that situation.

In all of the frequent reference made in the congressional debate to union violence and mass picketing there is not one statement, or suggestion, or even intimation, that we have found, that the Board was being given power to require a union to compensate an employee for loss of wages sustained by reason of that type of conduct. On the other hand, there is the specific statement (*supra*, page 35) in House Conference Report No. 510 on, H. R. 3020, p. 42, that unions were suable and liable for that type of conduct under ordinary principles of law. Furthermore, House Conference Report No. 510, at page 54, recognizes that the authority of the Board to require a labor organization to pay back pay to employees was applicable only

where the employees had suffered discrimination, and also shows that, at least in the opinion of the conferees, express language in the Act so providing was necessary to empower the Board to require a union to pay back pay. For instance, it was said in the report:

"The Senate amendment did not contain the provision specifically authorizing the Board to deprive representatives and employees who engage in unfair practices of rights under the act, but did contain a provision authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for *the discrimination* suffered by the employees.

The House bill, by implication, limited the Board in its choice of remedial orders in cases of unfair labor practices by representatives not involving back pay, by specifying but one type of order that the Board might issue. The conference agreement therefore omits this provision of the House bill. As previously stated, employees are subject to the prohibitions of section 8 (b) only when they act as agents of representatives, but in these and other cases, when they are disciplined or discharged for engaging in or supporting unfair practices, they do not have immunity under section 7. The language in the Senate amendment *without which the Board could not require unions to pay back pay* when they induce an employer to discriminate against an employee is included in the conference agreement." (Emphasis supplied; 1 Leg. Hist., Labor Management Relations Act, 1947, p. 558.)

From the foregoing it appears that the answer to petitioners' query as to why the Board should have power to require the union to reimburse an employee for wages lost by reason of discrimination, but not where the loss was caused by force or violence, is simply that Congress

did not so intend in the latter case but intended the common-law remedy to obtain.

If we turn to the common law in search of a reason why Congress conferred power on the Board to require a union to pay back pay in discrimination cases, but not in forceful and violent interference with the right of ingress to the place of work, we find that in the case of interference by force and violence the common law provided an adequate remedy, but that in discrimination cases in some jurisdictions it provided no remedy at all. Annot., 29 A. L. R. 532, at 543-547.

### **Plaintiff's Given Charge Nine.**

It is not clear from petitioners' brief whether or not they claim a reversal should result because of alleged error in the giving of plaintiff's requested charge 9 which is set forth in footnote 8 at page 14 of their brief, and is referred to again on page 61 of their brief. They say in passing, that this charge "deprived them of their Federally protected right to strike, by permitting the jury to return an award of damages solely upon a finding that excessive picketing was engaged in, without the necessity of finding that work would have been available to Respondent during the Federally protected strike engaged in by the great majority of the employees."

Assuming contrary to the holding of the Supreme Court of Alabama, that the charge should be construed to have that meaning, it did not deprive the petitioners of the federal right to strike, or to picket, or in any manner affect or detract from those rights. Indeed, charge 9 expressly states that picketing is lawful, and it directs a verdict for the plaintiff only on the hypothesis of the jury being reasonably satisfied from the evidence that the defendants stationed pickets on a public street as alleged in the complaint, for the purpose of preventing the plain-

tiff from entering his place of employment by means of intimidation, threats, coercion, force or violence, and that the plaintiff was thereby denied access to his place of employment. The defendants had no right, federal or otherwise, to engage in such unlawful picketing. Therefore, the charge could not possibly have deprived them of the federally protected right to strike or to picket peacefully.

Aside from the above, the Supreme Court of Alabama was correct in its holding that charge 9 should not be construed so as to authorize a verdict for plaintiff without a finding that work was available to him, and that he lost work by reason of the unlawful picketing. The term, "place of employment", connotes work. The idea conveyed by the expression that the purpose of the pickets was to prevent plaintiff from entering his place of employment, and that he was denied access to his place of employment, was that he was prevented from working. There naturally would have been no reason for the pickets to have prevented plaintiff from entering his place of employment unless work was available to him, and no reason for plaintiff to have wanted to enter except for the purpose of working. Especially is this the reasonable construction of charge 9 when it is considered in the light of the oral charge and the petitioners' given written charges numbered 5, 6, 10 and 11 (R. 623, 639-641). Charges 5 and 6 are illustrative, and are respectively:

"5. I charge you that unless you are reasonably satisfied from the evidence in this case that the proximate cause of plaintiff's inability to work at the Decatur plant of Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) during the period from July 18, 1951, to August 22, 1951, was that a picket line was conducted by the defendants in a manner which by force and violence, or threats of force and violence prevented plaintiff from entering the plant, and unless you are reasonably sat-

ified from the evidence that work would have been available to plaintiff in the plant during said period, except for picketing in such manner, you should not return a verdict for the plaintiff" (R. 639).

"6. I charge you that unless you are reasonably satisfied from the evidence that the acts complained of by plaintiff occurred, and that the plaintiff suffered a loss of wages as the natural and proximate result of said acts, you should return your verdict for the defendants" (R. 639).

The Supreme Court of Alabama had good grounds for its conclusion that charge 9 was not erroneous when reasonably construed because it is elementary that written instructions are to be construed in connection with each other and with the oral charge of the court.<sup>25</sup>

### **Reason and Justice Support the Judgment.**

The defendants' conduct was wrongful and the plaintiff was damaged as a consequence of it. That was established by the verdict.

The maintenance of any action such as this does not and cannot interfere with any function of the Board.

The judgment below does not deprive the petitioners of any right guaranteed to or conferred upon them by the Act. They were accorded their right to strike and their right to picket peacefully.

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<sup>25</sup> Such is the holding of the two cases cited by the Supreme Court of Alabama in that connection, namely, *Birmingham Southern Railway Company v. Harrison*, 203 Ala. 284, 82 So. 534; *Alabama Consolidated Coal & Iron Co. v. Heald*, 171 Ala. 263, 55 So. 181; and also *Lehigh Portland Cement Co. v. Donaldson*, 231 Ala. 242, 164 So. 97; *McGough Bakeries Corp. v. Reynolds*, 250 Ala. 592, 35 So. 2d 332; *Marbury Lumber Co. v. Lamont*, 198 Ala. 566, 73 So. 923; *Western Union Telegraph Co. v. Gorman*, 237 Ala. 146, 185 So. 743; *Scarpulla Giardina*, 209 Ala. 550, 96 So. 593.

The opinion in this case will rule similar ones where injuries may be more serious and may consist of broken bones, damaged automobiles, and even death. Suppose the plaintiff had not exercised self-restraint and had tried to force his way into the plant and his car had been overturned and damaged and he had suffered a broken arm and permanent injury. Or, to explore the question further, suppose he had received an injury resulting in death. That does sometimes occur as a result of force and violence in industrial strife. Would it be contended in an action by plaintiff for lost wages and personal injury and property damage in the case first hypothesized, or in an action by his widow in the second for his wrongful death, that the exclusive remedy lay with the Board? If not, what is the difference? Is the principle not the same? What difference should it make that an element of damage is a broken arm rather than a broken spirit? The complaint here claims damages for mental pain and anguish which, it has been said, are "actual damages in the same sense that damages for the loss of an eye, an arm, or a foot are actual damages."<sup>26</sup>

The defendants can avoid judgments such as this by limiting their picketing to peaceful picketing, and by refraining from blocking streets and entrances to plants by mass picketing and by the use of force, violence and intimidation. If petitioners will limit picketing to peaceful picketing, they will not be required to defend against actions such as this by an employee to vindicate his rights which were violated by their illegal picketing. If petitioners will respect the law and the rights of others, it will not be necessary that 75 highway patrolmen and 20 city policemen be diverted from their customary duties in order to preserve law and order and to keep the street open, as was necessary in this case when it became apparent

<sup>26</sup> *Birmingham Railway, Light and Power Company v. Coleman*, 181 Ala. 478, at 485, 61 So. 800.

that local law enforcement officers were unable to cope with the situation.

Many states have laws prohibiting the use of force or violence, or the threat thereof, to prevent any person from engaging in a lawful occupation.<sup>27</sup> Counsel for petitioners has heretofore conceded that the Act does not bar the states from punishing picket line violence by criminal prosecution.<sup>28</sup> This concession is not consistent with the argument here that a state court and jury is not competent to adjudicate the issues of this case, and that there will be varied interpretations and results in the numerous state courts. The issues in criminal prosecutions will be much the same as the principal issue here.

One of the chief reasons petitioners advance against the right to maintain actions such as this, is that the fear of staggering punitive damages will restrict the exercise of the federal right to strike and to picket. They say that Alabama is thereby "regulating" labor relation matters. Even if that were true, we have seen from the *Kohler* case from legislative history that Congress intended exactly that. Congress intended to leave intact all the sanctions a state could employ against force and violence.

Punitive damages serve much the same purpose as a criminal prosecution, and are allowed in order to punish the defendants for wrongful conduct and to set an example to deter the commission of similar wrongs in the future. The power to award punitive damages is vested in a jury for the public good. The law authorizing punitive damages

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<sup>27</sup> See, e. g., General Acts of Alabama, 1943, p. 256, §§ 9, 18; Code of Alabama, 1940, Supp. Tit. 26, §§ 384, 393.

<sup>28</sup> "Appellant concedes that a State may punish violence arising in labor relation controversies under its generally applicable criminal statutes." *Kohler* case, 351 U. S., at 268.

grows out of the concept that every human being is entitled to be free from indignities at the hands of those having no respect for the feeling and rights of their fellows. The power to award punitive damages constitutes the jury an effective instrument of government with the discretion to diminish the purse of those who violate the canons of proper behavior. It restrains malicious, wanton, fraudulent and willful misconduct; it vindicates the rights of the wronged; it discourages private reprisals, and, instead, encourages resort to, respect for, and confidence in, the courts as the appropriate instruments for the vindication of rights which have been violated. It constitutes a powerful and effective deterrent to oppression and wrongdoing which the criminal law is not always adequate to prevent. It is one of our valuable heritages from the wisdom of the common law. Concerning wrongful conduct, such as is now being considered, substantial awards of punitive damages will uphold the majesty and power of the law, while a criminal prosecution of the defendants for a misdemeanor would be wholly impotent and ineffective.

It is also to the interest of labor organizations that they be responsible for their torts. More than fifty years ago, before he was elevated to the bench, Mr. Louis D. Brandeis, in a debate with Mr. Samuel Gompers before the Economic Club of Boston, took the affirmative of the issue, whether labor unions should be incorporated, and pointed out the difficulty of reaching the funds of a union by legal proceedings. In speaking of that difficulty, he said this:

"But while the rules of legal liability apply fully to the unions, though unincorporated, it is, as a practical matter, more difficult for the plaintiff to conduct the litigation, and it is particularly difficult to reach the funds of the union with which to satisfy any judgment that may be recovered. There has consequently

arisen not a legal, but a practical, immunity of the unions, as such, for any wrongs committed.

“This is deemed by many labor leaders a great advantage. To me it appears to be just the reverse. It tends to make members and officers reckless and lawless, and thereby to alienate public sympathy and bring failure. It creates on the part of the employers, on the other hand, a bitter antagonism, not so much on account of lawless acts as from a deep-rooted sense of injustice, arising from the feeling that the union holds a position of legal irresponsibility.

“It has been objected by some labor leaders that incorporation of the unions would expose the funds collected as insurance to loss by reason of claims made for wrongs committed by the union. The amount of such claims recovered in any judgments would doubtless be small, but I could conceive of no money expended by a union which could bring so large a return as the payment of compensation by it for some wrong actually committed. Such payment would serve to curb the officers and members of the union from transgression of the law, but it would, above all, establish the position of the union as a responsible agent in the community, ready to abide by the law.”<sup>29</sup>

An adequate remedy should exist to redress torts committed in labor relation controversies. Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch. 137, at 163, wrote:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. \* \* \*

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<sup>29</sup> The Boston Herald, December 5, 1902, p. 1, col. 4, and p. 2, col. 4; see also remarks of Senator H. Alexander Smith, 2 Leg. Hist., Labor Management Relations Act, 1947, p. 1146.

“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”

Petitioners, in effect, are asking this Court to grant them immunity from liability for their torts. But legal accountability for wrongful conduct is one of the cornerstones of the common law; it is a sobering reminder to refrain. That is one of the virtues of the verdict and judgment here.

Respectfully submitted,

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